

A N
E N Q U I R Y,
HOW FAR THE
PROVOST OF TRINITY COLLEGE,
DUBLIN,
IS INVESTED WITH A
N E G A T I V E
ON THE
PROCEEDINGS OF THE SENIOR FELLOWS,
BY THE
CHARTER AND STATUTES OF THE COLLEGE.

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(Dr. Young).*

K Academiis. ... Trinity College.

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A N

E N Q U I R Y, &c.

THE statutes of Trinity College, Dublin, have, at least for several years, been interpreted in such a manner, as to give the Provost a negative upon all proceedings of the Senior Fellows whatever; and in the case of the election of Fellows and Scholars, in which the Senior Fellows are called Electors, and are accordingly duly sworn, the statutes are said not only to give him a negative, but a final affirmative

mative also, which renders the election, as far as it concerns the Senior Fellows, a mere nullity.

As this enormous power of the Provost is inconsistent with the effectual and active government of the College, contrary to law and reason, and destructive of that ardour with which the study of letters should be pursued, the election to a fellowship being thus made to depend on the learning and impartiality of a single person; and the principal academic reward of literary industry thus rendered subject to a discouraging uncertainty; it seems to be a matter of high concern to the kingdom at large, as well as to the University in particular, that the question should be fairly discussed, whether the Provost be indeed possessed of this extraordinary power.—And I am confident, that on an impartial and accurate examination of the statutes, it will be found, that

that he is invested with a negative in particular cases only, which are distinctly specified; and that his power, when he acts in conjunction with the Senior Fellows, is not greater than the power usually granted to the head of a corporation.

I fear some persons may, at first, be prejudiced against any thing which can be said in favour of such a liberal interpretation, from the supposed arbitrary principles of Archbishop Laud, by whom the statutes were framed; but we should consider, that these principles would operate solely to the extension of the *King's* prerogative. And accordingly we find, that the power vested in the Fellows, by the charter of Queen Elizabeth, of choosing their own Provost; and in the Provost and Fellows of framing their own statutes, was taken from them by the charter of Charles I. and lodged in the hands of the King, reserving to him,

and to his heirs for ever, the power of adding to or taking from the statutes, and of altering or dispensing with them at pleasure.

We should also remember, that such statutes as concern the public good ought to be construed liberally, Bacon's Abrid. p. 650. Now surely no statutes more intimately relate to the public good than those which provide for the maintenance of religion, and the advancement of learning; nor can any construction be more illiberal, than that which grants to one member of the corporation, a power of controlling and thwarting the measures of all the rest, in cases which most immediately affect these great objects.

The heads of every description of corporation have indeed contended for this negative power; but their attempts, in every instance in which they have been opposed, have been overruled and defeated.

feated. It appears that they grounded their claims on expressions, which implied the necessity of their presence only, not of their consent; and it is hoped, that our College will not afford the only case, in which similar language shall be perverted to the establishing a power so pernicious, and repugnant to law.

In the corporation of Denbigh, at the election of a burghers, it was argued, that there could be no election unless one alderman and one bailiff were consenting. But the court determined, that nothing more was required but the *presence* of one bailiff and one alderman at every election, and that they had *no negative voices*.
1 Strange, p. 54.

“ In the corporation of Ipswich, on a *mandamus* to restore Mr. Serjeant Whitaker to the place and office of Recorder of the town of Ipswich, a special return was made, to which an exception

ception was stirred by the Chief Justice, that in the power given in the charter to the bailiffs, burgesſes, and commonalty, or major part of them, to turn out a recorder *pro malegeſtura*, the bailiffs are made of the *quorum*, and therefore the bailiffs' conſent was neceſſary to the doing of it; and here in the return they had only ſaid, that the bailiffs were preſent, but not that they did conſent, as they ought.

“ Two answers were given to this exception. Firſt, that this muſt be underſtood like the clauſes in commiſſions of *Oyer and Terminer*, &c. which require the preſence of the perſons named in the *quorum*; but it was never yet thought, that their actual conſent was neceſſary to every act that was done, and that if they diſſented, the majority could not act; but their conſent has been always taken to be included in the conſent of the majority.

jority. Secondly, that it was returned here, that he was *debite modo amotus per ballivos, burgenses, & communitatem*, which must be understood of them all; and consequently both bailiffs consented.

“ This exception was overruled by the court, partly upon the second answer, and also because ‘ of the *quorum* the ‘ bailiffs should be two,’ was, like the *majori parti eorum*, no more than the law implied. For as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs being the head of the corporation, nothing can be done without their *presence*; and this is so, though no special provision be made for it by charter. And so it comes within the rule of *expressio eorum quæ tacite insunt nihil operatur*, and consequently their *express consent is not necessary*, but is involved in the consent of the major part.”

2 Lord Raymond, p. 1233.

In

In like manner there have been several disputes between Deans on one hand and Prebendaries on the other, concerning the negative power which the Deans claimed, by virtue of the statutes of their chapters in divers instances. In the church of Gloucester, about the year 1752, the Dean refused to affix the chapter seal to a lease agreed upon by the majority of the chapter; insisting that by the local statutes, his consent was absolutely necessary to the validity of such lease, which consent he would not give. But the Dean submitted before it came to a judicial determination. In the years 1752 and 1753, a like dispute happened in the cathedral church of Carlisle, about the Dean's negative in conferring benefices. The Dean entered a caveat against the admission of a curate, who had been unanimously elected by the Prebendaries; and the Bishop, at first, refused to admit
and

and licenſe him; but on a *mandamus* from the court of King's Bench, the curate was admitted. 2 Burne, p. 103. In like manner alſo the Warden of Wadham College, in the year 1776, contended for a negative, and refuſed to affix the corporate ſeal to a leaſe granted by the Fellows: but Lord Mansfield, and the three other Judges of the King's Bench at that time, granted a *mandamus*, by which he was compelled to acquieſce in the act of the majority.

In arguing on the preſent queſtion, I ſhall, 1ſt, conſider the different paſſages in the charter and ſtatutes, from which it has been concluded, that the Provost is inveſted with a negative in all caſes; and will endeavour to ſhew, that they do not eſtabliſh ſuch a power.

2dly, I will point out ſome of the evils and abſurdities conſequent on ſuch a power.

3dly,

3dly, I will illustrate the interpretation which I shall give of the statutes of Dublin College, by parallel instances from those of the University of Oxford.

4thly, Confirm it by the received principles of common and canon law.

And, 5thly, Shew in what circumstances business can or cannot be transacted even without the presence of the Provost.

The various forms of expression in the charter and statutes, from which alone the Provost can pretend to derive his general negative on all proceedings of the Senior Fellows, are these following :

1st. " Præpositum hujus societatis
" caput constituimus, eumque authori-
" tate summâ in moderandis personis, &
" negotiis Collegii, & in omnibus aliis,
" quæ ad Collegii regimen quovis modo
" spectant, vel spectare possunt, muni-
" mus." Cap. 4.

2d.

2d. " Quo melius autem munere suo
 " fungatur, ordinamus & volumus, ut e
 " toto sociorum numero, septem maximè
 " seniores focii ei sint tanquam assessores,
 " & ut eorum consilio & auxilio omnia
 " majora Collegii negotia tractet," &c.
 Cap. 4.

3d. " In quibus omnibus definiendis,
 " Præpositum, aut eo absente, Vice-præ-
 " positum unum semper esse volumus."
 Ibid.

4th. In the charter, and several pas-
 sages of the statutes, it is said, that the
 regimen of the College, and all elections,
 shall be defined and concluded " per
 " Præpositum & majorem partem Socio-
 " rum Seniorum;" that the power of
 electing is " penes Præpositum & majo-
 " rem partem Sociorum Seniorum," &c.

5th. " Quod si contigerit unum vel
 " plures e Senioribus Sociis a Collegio
 " peregrè abesse, cum res ejusdem Col-
 legii

“ legii Sociorum conventum postulare
 “ Præpositus judicaverit, numerus septe-
 “ narius è Junioribus Sociis secundum
 “ senioritatem assumptis, pro illâ vice
 “ completor, & quicquid Præpositus cum
 “ assensu, & consensu quatuor ex hoc
 “ numero septenario egerit, ratum esto.”

Cap. 4.

6th. His claim of nominating Fellows and Scholars in all cases, even against the unanimous opinion of all the rest of the electors, is grounded on the following passage: “ In quem vel quos major pars
 “ Sociorum Seniorum una cum Præposito,
 “ vel, eo absente, Vice-præposito consen-
 “ sisse deprehendetur, is vel ille pro
 “ electo vel electis habeantur; quod si
 “ primo vel secundo scrutinio electorum
 “ major pars, cum Præposito vel, eo ab-
 “ sente, Vice-præposito non consenserint,
 “ eo in casu, is vel illi pro electo vel
 “ electis funto, quem vel quos Præpo-
 “ fitus

“ situs vel, eo absente, Vice-præpositus
“ nominabit.”

Let us now examine the force of the several arguments grounded on these forms of expression, either considered simply in themselves, or with reference to each other.

1st. It is argued, that since the Provost is invested with the “ *authoritas summa* “ *in moderandis personis & negotiis Collegii, & in omnibus aliis quæ ad Collegii regimen quovis modo spectant* “ *vel spectare possunt*” (Cap. 4.), he must have a negative on all the proceedings of the board of Senior Fellows.

But it must be granted, that, though he should not have this absolute negative, he may well be said to be invested with the authority above described: he is the president of the board, “ *præsidet & “ primas tenet*” (Cap. 12.); convenes and
dismisses

dismisses it; disposes of the votes of the absent Senior Fellows as he pleases (Cap. 4.); has a negative in the election of the Vice-Provost (Cap. 12.); and in the perfecting of leases (Cap. 4.); and in all matters which require the College seal (*ibid.*); and in the money which is to be laid out by the Burfar; and in all matters relative to expulsions transacted by the Vice-Provost in his absence (Cap. 23); he has under his immediate care all officers and lecturers, particularly the Deans and Burfar; and can punish them at will for neglect of duty, except where the punishment is particularly specified; and, in short, almost all the penal statutes rest on him alone. This surely is sufficient to denominate him the head of the society, but by no means implies a negative in all cases. Nay, his negative being distinctly expressed in some cases clearly shews, that he has not a negative in all.

The

The forms of expression by which such a negative may be conveyed, were well known, and in common use at the time in which our statutes were framed: in the statutes of the English Colleges it is often conveyed thus, “ Per majorem partem sociorum cum consensu Præpositi;” and in our own variously, “ Non sine consensu Præpositi;” or “ In his omnibus nihil unquam fiat nisi consentiente Præposito;” or “ Id demum robur suum obtinebit cum Præpositi approbatio accesserit.” But no such *general* expressions any where occur in our statutes; they are used only in *particular* cases, and therefore we must conclude, that it was the intention of Archbishop Laud to extend the Provost’s negative to these particular cases *only*.

2dly. It is argued, that the Senior Fellows are called his *assessors*, or counsellors, whose advice he is at liberty to take

take or reject. But we should observe, that at the same time that they are called his assessors, the framer of the statutes directs, that the Provost shall transact all matters relating to the regimen of the College *with their advice and assistance* (p. 50); they therefore together make one aggregate, corporate body; and the act of the majority of that body is the act of the whole.

Now to prove that this is the true import of the term *assessors*, we may remark, that a Chapter is a *council assistant* to the Dean thereof in matters spiritual relating to religion (see Burne's Eccl. Law), yet the Dean has no absolute negative on their proceedings. (Wood's Instit. Laws of England, p. 28, and Watfon's Incumbent, $\frac{3}{5} \frac{6}{2} \frac{8}{3}$). And this case is strong in point, for the constitution of the corporation of a Dean and Chapter is in all respects similar to that of a College, and
indeed

indeed is sometimes so called. Wood's Instit. ubi supra.

In the charters granted by Henry VIII. and James I. to the Dean and Chapter of Christ Church, Dublin, all acts are ordered to be done by the *Decanus & Capitulum*, or by the *Decanus cum Capitulo*, which expressions convey no negative, nor has the exercise of such a power been ever attempted. The like observation is to be made on the *charter* of Carlisle, which you may see in Burne's Ecclesiastical Law, vol. ii. p. 86, who, in the same place remarks, that all other foundation charters are in the same form.

The Dean must be *present*, indeed, at all corporate acts, but his presence only is requisite, not his consent, in general. By the statutes, however, of some particular places, he has been vested with a negative in some matters (as the Provost seems to be by the statutes of the College, with res-

pect to all acts requiring the College seal) yet even in these cases the negative power has either been over-ruled by mandamus, or relinquished, as we have already observed.

Perhaps it may be asserted, and not without the sanction of law, that no negative or other power, granted to any constituent part of a corporation, is of any force or effect whatever, unless conveyed by the charter of incorporation. Bye-laws are those special rules by which every corporation, in particular, is governed; and every corporation has an inherent power of framing such laws, though this power be not distinctly expressed in the charter, unless the founder has specially reserved it to himself. And the reason is obvious, because no corporate body can subsist without laws for its government. But these laws must ever be subordinate to and consistent

fistent with the charter; for they are
 laws according to which certain powers,
 granted by charter, are to be exerted,
 not a delegation of new powers, or an
 abrogation of those which already exist.
 Now where the founder has reserved to
 himself this power of framing laws for
 the government of the corporation, it is
 evidently the same power, which, if not
 reserved, is incident to every corpora-
 tion, *Hob.* 11. This is expressed in di-
 rect terms in our charter, “ Cumque
 “ eadem nuper Regina, per easdem lite-
 “ ras suas patentes concesserit, & licen-
 “ tiam dederit *præfatis Præposito &*
 “ *Sociis ejusdem Collegii, ut leges, statuta,*
 “ *& ordinationes, pro suo Collegio piè*
 “ *& fideliter gubernando, de tempore*
 “ *in tempus, in perpetuum face-*
 “ *rent, constituerent, & confirmarent,*
 “ *nos hanc potestatem, statuta, & or-*
 “ *ditiones condendendi & constituendi,*
 C 2 “ *præfatis*

“ *præfatis Præposito & Sociis prædicti Col-
 legii, ut præfertur, prius concessam
 nobismet ipsis, hæredibus, & succef-
 foribus nostris modo reservari & con-
 tinuari volumus in perpetuum.*”

Since, therefore, the power of framing bye-laws, reserved to the founder, is that very same power which, if not reserved, is incident to the corporation, it must evidently be subject to the same restrictions. But it is a principle admitted, that a bye-law is not good which is made in restraint of right, *Viner*, art. *Bye-laws*; and Lord Hardwicke tells us, that any bye-law, which is contrary to charter, is void, *vide Cases Temp. Ld. Hard. p. 284*. We may therefore assert on good grounds, that no negative or other power, conveyed to any constituent part of a corporation, by virtue of a bye-law, can be of any force or effect whatever, unless it be consonant with the powers

powers antecedently granted by charter. If it were otherwise, this manifest absurdity would follow, that the powers granted by charter might be rendered subject to such restrictions, under bye-laws, as to become useless or impracticable ; that is, chartered rights might at pleasure be annulled ; which is repugnant to all received notions of the privileges of corporate bodies.

In the charter of the Royal Society, granted in the reign of Charles II. it is decreed “ quod eædem personæ sic ut
 “ præfertur ad concilium prædictæ Reg.
 “ Soc. electæ, præfectæ & juratæ, erunt
 “ & existent, *auxilantes, consulentes, &*
 “ *assistentes*, (sc. Præsidi) in omnibus ma-
 “ teriis, rebus, & negotiis,” &c. just as
 in our statutes it is said of the Senior
 Fellows, “ ut ei (sc. Præposito) sint tan-
 “ quam *assessores*, & ut eorum *consilio &*
 “ *auxilio*

“ *auxilio* omnia majora collegii negotia tractet.” In like manner, in the charter of the Royal Irish Academy, the Council is said to “ be *aiding* and *assisting* ” to the President in all matters respecting the better government of the Society.” Yet we know, that in neither of these societies has the President a negative on the proceedings of the Council; measures being always carried by a majority of votes.

3dly. It is argued, that in the fourth chapter, the following passage proves the necessity of the Provost's or Vice-Provost's consent in all cases: “ In quibus omnibus definiendis Præpositum aut, eo absente, Vice-Præpositum unum semper esse volumus.”

That these latter words denote merely the necessity of the Provost's being present in order to constitute a quorum, is evident

evident from such a multitude of instances, which may be seen in Rymer's *Fædera*, in special commissions granted at the very same period in which our charter and statutes were framed, nay even to the very framer of them, Archbishop Laud himself, that it were endless to cite them all. I shall refer only to a few, and quote particularly the charters of the Royal Society, and the College of Physicians. In Rymer's *Fædera*, vol. 18. p. 13, we have a special commission in the following form, " We do hereby
 " give full power unto you, or any four
 " or more of you, whereof the said
 " Sir Richard Weston, Sir John Coke,
 " Sir Thomas Smith, or Sir John Wol-
 " stenholme, to be one," &c. In the
 commission, " *Pro visitatione Collegii*
 " *Westmonasteriensis*," vol. 19. p. 630.
 " *Concedentes vobis aut aliquibus tribus*
 " *vel pluribus vestrum, quorum præfa-*
 " *tum*

“ tum Archiepiscopum Cantuariensem
 “ (sc. Gulielmum Laud) unum esse vo-
 “ lumus.” Also in vol. 20, p. 26, “ Do-
 “ nantes ac tenore præsentium conce-
 “ dentes vobis, aut aliquibus tribus aut
 “ pluribus vestrum, quorum præfatum
 “ Archiepiscopum Cantuariensem unum
 “ esse volumus.” See also p. 27. and
 vol. 18. pag. 83. 110. 127. 132. 133. 1051.
 In which forms of expression, “ *unum esse*
 “ *volumus*” is on all hands admitted to
 signify merely *presence*, and not to con-
 vey a negative. In the charter of the
 Royal Society, the same phrase is fre-
 quently repeated, “ Concilium consistet
 “ ex viginti & unâ personis, quorum
 “ Præsidem semper unum esse volumus.”
 And in the charter of the College of Phy-
 sicians, “ The President and Fellows of
 “ the same college for the time being, or
 “ any five or more of them, whereof
 “ the President, or in his absence the
 Vice-

“ Vice-President, to be one, shall elect,
 “ nominate and choose:” yet in neither
 of these societies has the President a ne-
 gative. In Strange’s Reports it is shewn,
 that when a power of election is vested
 in a set number of persons, or the major
 part of them, “ quorum unum ballivo-
 “ rum & unum aldermannorum duos
 “ esse volumus,” the *presence* of these two
 only is requisite, and *not their consent*. In
 the common case also of a Quarter Ses-
 sions a Justice of the Quorum must be
 one, but yet the act of the majority
 binds him. 1 Strange, 53. See also the
 case in 2 Lord Raymond, p. 1233, al-
 ready cited in page 7.

The phrase therefore, *shall always be one*,
 in our statutes, denotes only the necessity
 of the presence of the Provost or Vice-
 Provost, in order to constitute a quorum,
 so that any acts done by the Senior Fel-
 lows in his absence are of no effect; ac-
 cording

according to the practice and laws of other corporations, and to the import of the phrase, “ Per Præpositum & majorem partem Sociorum Seniorum,” already explained.

4thly. It is argued, that in the charter, and in several passages of the statutes it is said, that all elections shall be defined and concluded “ per Præpositum & majorem partem Sociorum Seniorum;” that elections, &c. are “ penes Præpositum & majorem partem &c. ;” and that these phrases are descriptive of the persons who must be actually consenting to the carrying of any measure; so that no collegiate act is valid, unless the Provost concur in opinion with four Senior Fellows.

But it is answered that these phrases, and others to the same effect, denote only the quorum which is requisite for the executing

executing of all college business, as is usually done in charters and other grants of the like nature. For if we compare the forms in which quorums are usually expressed, with that given in p. 50 of the statutes, the analogy will appear so obvious as to leave no doubt remaining:

“ Volumus ut Præpositus & horum Seniorum pars major, nempe quatuor, collegii regimen, &c. definiant & concludant. In quibus omnibus definiendis Præpositum aut, eo absente, Vice-Præpositum unum semper esse volumus.”

The quorum in the special commission for the visitation of Westminster College runs nearly in the same form: “ Concedentes vobis, aut aliquibus tribus vel pluribus vestrum, quorum præfatum Archiepiscopum Cantuariensem unum esse volumus.” And the quorum in the charter of the Royal Society still more so: “ Liceat & licebit præfatis Præsidi,
“ concilio

“ concilio & sodalibus vel majori parti
 “ eorundem, quorum Præsidem unum
 “ esse volumus,” &c.

The form of the grant in Queen Elizabeth's charter, “ Liceat Præposito & “ Sociis vel majori parti eorundem,” is of the same import with those in Charles's charter and statutes, “ per Præpositum & “ Socios seniores, vel per majorem partem “ eorundem una cum Præposito,” pag. 29; and “ Præpositus & focii Seniores “ vel major pars eorundem,” pag. 25. and “ A Præposito & septem Senioribus, aut “ saltem majori parte eorum,” pag. 52. Compare also pag. 145. and 157. 159. 167. 170. But this form of Elizabeth's grant is precisely the same with that in her charter to the city of Bristol, “ Li- “ ceat Majori & Aldermannis vel majori “ parti eorundem,” &c. which is allowed to be a description of a quorum. See 3 Mod. p. 10.

Though

Though the word “eorundem,” in Elizabeth’s charter, seems to relate solely to the Fellows, so that the quorum should consist of the Provost and major part of the Fellows, yet it may be referred to the Provost and Fellows conjointly; in which case, the presence of the Provost not being necessary to constitute a quorum, college business might be transacted without him: and a doubt of this nature did actually arise on the construction of the charter of Bristol, as appears in the case in 3 Mod. Rep. just referred to. “If the charter had intended,” says the Recorder, “that there can be no chusing
 “ of an Alderman, but by the summons
 “ of the Mayor, and in his presence, it
 “ would surely have made him of the *quorum*
 “ *rum* in that clause that provides for the
 “ election of an Alderman; but that it
 “ does not; the only quorum is not of
 “ the sort of persons, but of the majority
 “ of

“ of the electors, *major pars eorum* (having mentioned before the Mayor and Aldermen).” To remove this ambiguity, the words “ *una cum Præposito*,” were inserted in the charter of Charles, so as clearly to constitute the Provost one of the quorum: and that nothing farther was intended by that insertion is evident, because these words are sometimes omitted, as we have seen in the passages above cited.

The Registry of the University still farther confirms this position. In the year 1660 there came a *mandamus* from Charles II. to the Provost of the College, commanding him to admit five persons therein mentioned into senior fellowships; and then the King proceeds, by special commission, to empower these Senior Fellows to act in the election of Junior Fellows in the following form:

“ And we do hereby empower you, the
“ Provost

“ Provost and the Senior Fellows above-
 “ mentioned, or any four of you, toge-
 “ ther with the Provost, to proceed im-
 “ mediately after your admission to Se-
 “ nior Fellowships to election of Junior
 “ Fellows,” &c. From which it clearly
 appears, that the grant in the statutes is
 of the same import with that in the
 above cited commission, and is therefore
 to be interpreted in the same manner ;
 but it is universally acknowledged, that
 no negative is conveyed to any member
 of a special commission by such a form
 of words.

In the charter of the Royal Society,
 given in the reign of Charles II. as we
 have already observed, the power of all
 elections and other acts of the Society is
 vested in the President, Council and Fel-
 lows, and the greater part of them ; but
 this form of expression conveys no ne-
 gative to the President. In like manner,
 in

in the charter of the Royal Irish Academy, the President and Council, sixteen being the quorum, of which the President must be one, have full power and authority to make and enact private ordinances and bye-laws; in the same manner as the Provost *and* major part of the Senior Fellows (p. 150); or, as it might be otherwise expressed, *The Provost and Senior Fellows, five being the quorum, of which the Provost must be one.* Yet in these cases, as is well known, the President has no negative on the proceedings of Council. Lord Chief Justice Parker has drawn a parallel between such cases and that of the city of London, where the *Mayor and Common Council* have power to do acts; and yet the act of the majority of the Common Council is good, *though the Mayor dissents.* Strange's Reports, vol. i. p. 54. Burne, in his Ecc. Law, art. *Leases*, has a gloss to the same effect

effect on the following words of 13 Eliz. c. 10. " All leases, gifts, grants, feoffments, &c. made by any *Master and Fellows, Dean and Chapter, &c.*" that is, says he, *by the major part* of such body.

Were it necessary many more parallel cases might be adduced; but in truth the charters of all corporations run almost in the same form; and the power granted to the head of the corporation *and* the majority does not imply a negative, except in such cases as are particularly specified. But were we deprived of all kind of precedents and parallel cases, there is an argument grounded on a certain clause in the statutes, which is so clear and full to the point, that its single authority would be sufficient to decide the question, and convince us that the declaration in the charter and statutes, that all elections shall be concluded " *per Præpositum & majorem partem*

D

" *Sociorum*

"Sociorum Seniorum," is merely descriptive of the collegiate quorum, and consequently involves no negative power of the Provost. The clause I allude to occurs in the chapter "De officio Vice-Præpositi:" in that chapter it is said, that the Vice-Provost is to be elected "per Præpositum & majorem partem Sociorum Seniorum." From this passage, simply considered, it would follow, (the Provost not being invested with a negative by that phrase) that a Vice-Provost might be chosen by the Senior Fellows contrary to the consent of the Provost. But as in this particular case, the framer of the statutes meant that the Provost should have a negative, he annexed the subsequent clause, "Sed quia officium hoc, ægrotante vel absente Præposito, multum conducit ad regimen et pacem studentium, neminem volumus ad hoc munus eligi, nisi
 "consen-

“ consentiente, et approbante Præposito,” which clause would have been entirely nugatory had he conceived, that a negative had been conveyed to the Provost by the former. And we may observe, that this clause is not introduced lightly or incidentally, but with the utmost solemnity, and in the most emphatical manner: and the first words of the sentence, *Sed quia officium hoc*, distinguish the mode in which this election “ per Præpositum & majorem partem Sociorum Seniorum,” is to be conducted, from all others; and, at the same time, the reason of that distinction is assigned.

If we compare this clause, and the manner of introducing it, with a passage in the chapter, *De autoritate Præpositi & Sociorum Seniorum*, it will clearly appear, that the latter is precisely of the same import, and confirms the doctrine now

advanced, by a similar exception: This passage in the 4th chapter is as follows,
 “ Volumus igitur, ut Præpositus & ho-
 “ rum Seniorum pars major (nempe
 “ quatuor) Collegii regimen, electiones
 “ omnes fociorum, officiariorum, dis-
 “ cipulorum, & ministrorum Collegii,
 “ graduumque collationes definiant &
 “ concludant. In quibus omnibus de-
 “ finiendis Præpositum, aut, eo absente,
 “ Vice-Præpositum unum semper esse
 “ volumus. In dimissione autem terra-
 “ rum, aut tenementorum, domuumve
 “ ad firmam, & omnibus aliis instru-
 “ mentis faciendis, quæ sigillo Collegii
 “ munienda sunt, nihil unquam fiat,
 “ nisi consentiente & suffragante Præpo-
 “ sito; aut si fiat, pro irritato habeatur.”

In the first clause, we have already seen, that the expression *unum esse volumus* implies no more than the presence of the Provost, or in his absence, of the Vice-

Provost;

Provost; which is sufficient to authenticate acts of the board in any of the *majora negotia* there specified. But in cases where the College seal was to be affixed, it was judged necessary, that something *more than the presence* of the Provost or Vice-Provost should be required. The actual consent and approbation of the Provost, whether present or absent, was made essential to the validity of all such acts. In all the *majora negotia*, says the statute, the Provost or Vice-Provost must be one, that is, must be present; but in the letting of leases, the Provost must further give his consent. So that the privilege of the Provost, here spoken of, is not contrasted with that of the Vice-Provost in the former passage, but is a requisite *superadded* to those which in other cases must conspire to render an act of the corporation valid. Had it been intended as a contrast, the expressions

pressions would have been contrasted ; either the former sentence would have run thus, " in quibus omnibus definiendis " nihil unquam fieri volumus sine *con-* " *sensu* Præpositi, aut, eo absente, Vice- " Præpositi ;" or the latter would have been adapted to it as it now stands. Farther, were it so contrasted, the consent of the Provost would be the only circumstance of difference ; now the Vice-Provost has no authority unless when present ; therefore the Provost likewise should be present, when this circumstance of superior authority were to take place. But this is not fact ; for from time immemorial, leases have been made and sealed in the absence of the Provost ; but not without his special consent for affixing the College seal first given, either *vivâ voce*, or by written authority, at his leaving the College ; or by letter during his absence. This privilege

lege of the Provost is fimilar to that granted to the Dean of Carlisle by the statutes of the chapter: “ Statuimus
 “ etiam & volumus, ut in omnibus caufis
 “ gravioribus, veluti in feodi conceffione,
 “ terrarum & firmarum dimiffione, ac
 “ beneficiorum collatione, aliisque id
 “ genus rebus, decani (fi præfens fit)
 “ confenfus obtineatur, fin *absens fuerit*
 “ (modo intra regni noſtri Angliæ limi-
 “ tes degat) *confenfus ejus requiratur.*”

From thefe paſſages duly confidered it appears, that where any college buſineſs is ordered to be tranſacted “ per Præpoſi-
 “ tum & majorem partem Sociorum Se-
 “ niorum,” it cannot be underſtood, that theſe are the parties which muſt neceſſarily concur in opinion; ſuch expreſſions can therefore only ſignify, that they are the parties which muſt neceſſarily be preſent; but that the Provost has no negative: and that it is poſſible a meaſure
 may

may be carried contrary to his private approbation. So that although every corporate act is said to be carried by the Provost and major part of the Senior Fellows, yet this is not in virtue of the concurrence of his own private opinion with theirs, but of his being involved in the majority, whose act is always esteemed the act of the whole. This point is ascertained by a variety of cases; I shall only cite that of the King versus Grimes, capital burghers of Yarmouth, which was tried before Lord Mansfield; the directions of the charter are “ Quod Major & un-
 “ decim capitalium Burghensium vel major
 “ pars eorum (quorum Majorem Burgi
 “ unum esse volumus)” are to meet in order to proceed to election. After the major part of the subsisting number are so assembled together, then indeed the major part of those who are so assembled are to elect and nominate; and the ma-
 jority

jority amongst those so assembled involves the whole number, who are all bound by the majority of such meeting. Burr. Rep. vol. v. p. 2601.

5thly. It is argued in favour of the Provost's general negative, that an extraordinary visitation may be called either "per Præpositum & majorem partem Sociorum Seniorum," or "per totum numerum Sociorum Seniorum, reluctante Præposito." See pag. 147. Now it is argued, that if by the former of these sentences a collegiate quorum were only meant, and not the concurrence of the Provost's opinion with that of four Senior Fellows, it would follow, that a visitation might be called by four, or, at least, five Senior Fellows; and therefore it would have been nugatory to subjoin, that a visitation might be called by seven. The phrase therefore "per Præpositum &
" majorem

“majorem partem Sociorum Seniorum” cannot be descriptive of a quorum, but must mean a concurrence in opinion of the persons therein mentioned.

But it is answered, that this is entirely consonant with the practice of other corporations, in which, when duly assembled, the act of the major part binds the whole; yet the same major part, when the head of the corporation is not present, is not competent to execute valid acts. In like manner in special commissions, where a quorum is appointed, of which a particular person is named to be necessarily one, though every member of the commission, except that one, be assembled and unanimous, their act is invalid; yet if he be present, a simple majority is sufficient, and their act binds the whole. The intention therefore of this passage of the statutes is, evidently, to provide for three distinct cases, in which an extraordinary

traordinary visitation may be required,
 “ vel per Præpositum et maiorem partem
 “ Sociorum Seniorum, vel per Præposi-
 “ tum solum, vel per totum numerum
 “ Sociorum Seniorum, reluctante Præ-
 “ posito ;” that is, either by a majority
 of the body corporately assembled, in
 the usual manner ; or by either of the
 integral parts of the corporation, inde-
 pendently of the other, without being
 corporately convened ; either the Provost
 not calling a board, or four Senior Fellows
 agreeing to absent themselves, from a like
 apprehension on both hands, that a visi-
 tation might be demanded by the board
 once actually convened. It is farther an-
 swered, that the passage here alluded to
 operates with equal, if not greater force,
against the Provost’s negative ; for if the
 Provost alone can call a visitation, it is
 nugatory to say, that he can also call a
 visitation when four Senior Fellows con-
 cur

cur with him, and therefore the phrase
 “ per Præpositum et majorem partem
 “ Sociorum Seniorum” cannot signify a
 concurrence in opinion of the persons
 therein mentioned. The whole passage,
 therefore, so far from affording any argu-
 ment in favour of the Provost’s negative,
 evidently makes against it in the strongest
 manner; the distinction of the three
 cases in which a visitation may be called,
 being entirely inconsistent with any such
 negative power.

6thly. It is argued, that the clause
 p. 51, “ Quicquid Præpositus cum assensu
 “ & consensu quatuor ex hoc numero
 “ septenario egerit ratum esto,” directly
 implies, that the Provost himself must be
 assenting and consenting to every valid
 act; or rather that the Provost alone acts,
 and the Senior Fellows give their con-
 sent only.

But

But in answer to this, we need only read the following *preamble* to the 33 Hen. VIII. c. 27. “ Albeit that by the
 “ *common laws* of this realm of England,
 “ all assents, elections, grants and leases,
 “ had, made, and granted by the Dean,
 “ Warden, Provost, Master, President, or
 “ other governor of any cathedral
 “ church, hospital, college, or other corporation, by whatever name they be
 “ incorporated and founded, with the
 “ assent and consent of the more or greater
 “ part of their chapter, fellows, or brethren of such corporation, having
 “ voices of assent thereunto, be as good
 “ and effectual in the law to the grantees and lessees of the same, as if the
 “ residue or whole number had thereunto consented and agreed,” &c.

On this preamble, compared with the clause of our statutes now under consideration, we reason thus : if, because the
 statutes

statutes of the College declare, that the acts of the Provost, with the consent of the major part of the Senior Fellows, are valid, it follows that these statutes invest him with an absolute negative on all proceedings of the Senior Fellows; for the very same reason, since by the *common law* of the land, the acts of the head of every corporation with the consent of the major part are valid, it likewise follows, that the *common law* of the land gives the head of every corporation a negative upon the proceedings of all the rest of the members of that corporation: which is a consequence too absurd to be maintained. “Whenever a
 “Dean and Chapter doth confirm
 “grants,” says Wood, “the Dean must
 “*join with* the Chapter—but the Dean,
 “or any other, *has no negative voice.*”
 Instit. Laws of Eng. pag. 28. “Though
 “one that is Dean,” says Watson, “be
 “Dean

“ Dean *de jure* as well as *de facto*, yet
 “ neither he nor any other of the cor-
 “ poration, hath a negative voice ; but
 “ confirmations and other grants are
 “ good, if made by the major part of
 “ the whole corporation ; for the Dean
 “ and major part of the corporation
 “ make the corporation, though the rest
 “ dissent. 14 H. 8. 29. 21. E. 4. 27. 15.
 “ E. 4. 2. a 9. H. 6. 32. And for this
 “ purpose was enacted 33 Hen. 8. c. 27,”
 pag. $\frac{3}{5} \frac{6}{2} \frac{8}{3}$. And though perhaps this
 act be not in force in this kingdom,
 yet this makes no difference in the pre-
 sent case, because our argument rests
not on the enacting part of the statute,
 but on the *preamble*, which is merely
 declaratory of the *common law* of the
 land ; which law obtains in this coun-
 try equally with England. An Abbot
 was said also to make grants, with the
 consent of the Convent ; but the fee
 simple

simple was in the Abbot, not in the Abbot and Monks. See Watson, pag. $\frac{5}{6} \frac{3}{5} \frac{2}{6}$. 541. 543. Yelv. 31. For the Abbot was a *sole corporation*, the Monks being dead persons in law, and not capable of being parties to a lease. "Every body politic or corporate," says Lord Coke, "is either ecclesiastical or lay; ecclesiastical, either regular, as Abbots, Priors, &c. or secular, as Bishops, Deans, Archdeacons, Parsons, Vicars, &c." 1 Inst. 250. The Abbot therefore was *the sole acting part*, subject however to the controul of the Convent. In the same manner a Bishop was subject to the controul of the Dean and Chapter: for the law did not think fit to trust a single person, or *sole corporation*, as an Archbishop, Bishop, &c. with the disposition of estates held in right of the church; and therefore, by way of restraint, appointed the *assent* of some others, without which
 their

their grants should not be valid against the successor. Burne's Ecc. Law, vol. ii. p. 328. " Irrita est donatio, venditio, " permutatio rei ecclesiasticæ facta a " Prælatiſ, puta Episcopo, aut Archie- " piscopo, aut Patriarcha, vel Abbate, " sine consensu capituli." See Cujacius, vol. vi. p. 1014. And to the same purport Fitzherbert, in his *Natura Brevium* tit. *Sine assensu capituli*, " The writ " of *Sine assensu capituli* lieth, where a " Dean, Bishop, Prebendary, Abbot, " Prior, or Master of an hospital, alien " the lands which they have in right of " their House, Abbey, or Priory, with- " out the assent of their convent, or " their chapter, or brethren, &c. he who " is the successor shall have the writ.— " And hereby it appeareth, that a Pre- " bendary shall have a writ *De sine as-* " *sensu capituli*; by which it seemeth, " that he hath a fee simple in the pre-
E " bend."

“ bend.” Lord Coke also thus speaks to
 the same effect: “ An Abbot, Prior, Bi-
 “ shop, Dean, Archdeacon, Prebend,
 “ Parson, Vicar, or any other *sole corpo-*
 “ *ration*, that is seized *in auter droit*, can-
 “ not disclaim, because, as Littleton
 “ saith, they alone cannot divest any
 “ fee which is vested in their house or
 “ church. For the wisdom of the law
 “ would never trust one sole person with
 “ the disposition of the inheritance of
 “ his house or church. But an Abbot
 “ and Prior had their convent, the Bi-
 “ shop his chapter, the Parson and Vicar
 “ their patron and ordinary, and the
 “ like of *other sole corporations*, without
 “ whose assent they could pass away no
 “ inheritance.” 1 Inst. 103. The rela-
 tion therefore of an Abbot to a Convent
 was the same with that of a Bishop to a
 Dean and Chapter, both being *sole acting*
parts, under the restraint of another
 body,

body in a particular instance: for the Abbot and Bishop are the principal grantors; the other parties, to wit, the convent and chapter, not having any real interest in the land. But in corporations *aggregate*, consisting of divers persons, as Masters and Fellows, Dean and Chapter, where the head acts with the consent of the major part, as expressed in the preamble to the statute above referred to, and all are equally interested, there is no controuling power. And on this ground Lord Chief Justice Holt makes a good distinction: "There is a great diversity," says he, "between Abbot and Convent, and Master and Fellows, Mayor and Commonalty, &c. For in the case of Abbot and Convent, there must be the major part and the Abbot besides; and the reason is, because the Abbot *only acts*, with the consent of the major part of the

“ rest; but in the case of Master and
 “ Fellows, &c. the Master himself is but
 “ *part of the acting part*, and he is one of
 “ the grantors, just as the rest.” 12 Mod.
 p. 232.

So that though the Provost may be said to execute a valid act with the consent of the major part of the Senior Fellows, or a valid act may be said to be executed with the consent of the Provost and major part of the Senior Fellows, yet the Provost and this major part are not to be considered as different concurring parties, but as one consenting whole. The act of a Dean with the consent of the major part of the Chapter is valid; so is the act of the Provost with the consent of the major part of the Senior Fellows; but the Dean has no negative. He must indeed be present, but his consent is concluded by that of the majority: and the meaning of the
 preamble

preamble of the statute above cited is, that the head and major part of the corporation being present, the act agreed on by the majority so assembled is valid. And the same interpretation is to be given of the same form of words in our statutes.

“ A material difference,” says Bacon, see his Abridg. p. 382, tit. *Lease*, “ is to
 “ be observed between a real interest,
 “ and a bare authority or power only,
 “ as to the manner of concurring in
 “ leases ; for if a Dean be seized of
 “ lands, in right of him and his Chap-
 “ ter, or Master or Warden of an Hof-
 “ pital or College in right of himself
 “ and the Brothers and Sisters, or Fellows
 “ of the same College, or a Mayor in
 “ right of himself and the Commonalty,
 “ and the Dean, Master, Warden or
 “ Mayor make a lease by indenture be-
 “ tween the Dean and Chapter, Master
 “ or

“ or Warden, and the Brothers and
 “ Sisters or Fellows of the same Hospital
 “ or College, or between the Mayor and
 “ Commonalty of the one part, and
 “ J. S. of the other, whereby the Dean
 “ with the assent and consent of the
 “ Chapter, or the Master with the assent
 “ of the Brothers and Sisters, or the
 “ Warden with the assent of the Fel-
 “ lows and Scholars, or the Mayor with
 “ the assent of the Commonalty, lease
 “ such lands to J. S. and with such as-
 “ sent or consent put thereto their com-
 “ mon seal; this is a void lease, for the
 “ Chapter, Brothers and Sisters, Fellows
 “ and Scholars, or Commonalty, are
 “ equally seized, and have an equal right
 “ and interest in the lands with the
 “ Dean, Master, Warden or Mayor,
 “ and therefore ought to join in the
 “ leasing or granting part of the deed,
 “ and not only to give their assent, *for*
 “ *they*

“ *they all make but one person in law ; and*
 “ *a body cannot be distinct, so as that one*
 “ *part may assent to the acts of the other :*
 “ but if the Dean were *sole seized* of
 “ the lands in right of his deanery, the
 “ Master or Warden in right of their
 “ master or wardenship, or the Mayor
 “ in right of his mayoralty, then the
 “ lease of the Dean, Master, Warden or
 “ Mayor alone, with the assent and con-
 “ sent of the other persons before men-
 “ tioned, is sufficient ; because the
 “ Dean, Master, Warden or Mayor only
 “ are seized and have a real interest, and
 “ the other persons before mentioned
 “ have no interest at all, but only a
 “ bare right or power of assenting to
 “ the leases or grants of their respective
 “ heads, and therefore their assent or
 “ consent is sufficient, without joining
 “ in the leasing or granting part. So if
 “ an Abbot or Prior be seized of lands
 “ in

“ in right of the Abbey or Priory, yet
 “ because the Monks are all dead per-
 “ sons in law, and not capable of hav-
 “ ing any lands, of being impleaded,
 “ and such like acts; therefore though
 “ they, together with the Abbot or
 “ Prior, constitute and make up but
 “ one body, yet the Abbot or Prior
 “ only have the power of leasing, and
 “ the assent or consent of the Convent
 “ must be had and expressed by affixing
 “ their common seal, in the same man-
 “ ner as where the Chapter, having no
 “ interest in their own right, are to
 “ assent to the leases of their Dean.
 “ So likewise where a Parson makes a
 “ lease for years, he *only* is to grant or
 “ lease the lands, and the Patron and
 “ Ordinary are only to give their con-
 “ sent by affixing their respective seals,
 “ and expressing their assent or consent
 “ in the body of the deed; for the Par-
 “ son

“ son is the principal grantor, and the
 “ others have not any real interest in
 “ the lands, though the law has thought
 “ fit to require their assent to all leases
 “ or estates to be made by the Parson.”

Dyer 40. *Chafin's Case*. Plow. 199. Roll.
 Abr. 478. 8 H. 7. 7. 8. 2 Leon. 176.
 4 Leon. 11. *Clerk's Case*. Bro. Tit. *Confir-*
mation 30. Tit. *Faits*. 45. Co. Lit 300.
 346. Godb. 210. *Ireland & Barker*.

When, therefore, in the statutes, the
 Provost and major part of the Senior
 Fellows are said to consent, it cannot sig-
 nify, that the major part of the Senior
 Fellows consents with the Provost, for
 this would be to make them different
 consenting parties, contrary to the na-
 ture of an aggregate corporation; but
 that the Provost and major part of the
 Senior Fellows, considered as one body,
 and one person, and therefore having
 but one will, consent or agree in a cer-
 tain

tain measure: unless indeed it can be proved, that the Provost is a *sole corporation*, or the Senior Fellows *dead persons in law*.

Were it necessary to add any thing further in refutation of this 6th argument, I might add, that there is no form of returns to Parliament writs more usual than the following, "Major
" five Ballivus A. elegit B. assensu com-
" munitatis villæ C." See *Brady on Boroughs, passim*. Yet no man will pretend, that the Mayor's or Bailiffs consent and co-suffrage was absolutely necessary to render the return valid: nay, so far is such a form of words from conveying a negative, that it does not very distinctly imply, that the Mayor or Bailiff has even a vote, except where there is no majority.

7thly.

7thly. It is further argued, in favour of the Provost's negative, that the final settling of College accounts, on the 20th of November, is said to be made "coram Præposito & omnibus Senioribus Sociis," (Cap. 26.); and that immediately after it is ordered, that as soon as the accounts shall be settled, the election of College officers shall be concluded by the Provost and major part of the Senior Fellows; which latter phrase cannot therefore signify merely the presence of the Provost and *major part* of the Senior Fellows, as it appears from the preceding passage, that they are *all* necessarily present. And consequently, since it does not signify presence, it must signify the consenting parties.

But it is answered, that the former phrase "coram Præposito & omnibus Senioribus Sociis," cannot signify a necessity of their being actually present,

as

as it would be absurd to suppose, that the absence even of one member of the board should prevent the College accounts from being finally settled; it would be directly contrary to the constitution and usage of every corporation in the world, in which it is acknowledged, that the head and major part of the corporation are competent to the execution of every corporate act whatever. This passage can therefore only mean, that all the Senior Fellows must be summoned to attend the settling of accounts, and may all attend if they please, but all are not necessarily obliged to attend. And the reason for inserting this passage was to render this final statement of accounts more perfect and accurate than that which is made at the close of every quarter; and to correct any errors that might have been committed in them. For the quarterly accounts are, or may
be

be settled before the Provost and *one Senior Fellow* only, the Senior Dean, (Cap. 19.); but at the annual settling of accounts *every* Senior Fellow has a right to inspect them, if he pleases; and to examine whether justice has been done to himself and his brethren, as well as to the College. But though the annual accounts may be thus settled before the Provost, and any number of Senior Fellows, yet it is not so with respect to the elections of officers; to render them valid the *quorum* must be present, and if it be not, no election can be concluded.

8thly. It is argued, not from any particular passage of the statutes, but in general, that the Provost is an integral and substantive part of the corporation, and therefore that his concurrence and consent is necessary to every corporate act.

But

But it is answered, that all that can be deduced from his being an integral and substantive part of the corporation, is the necessity of his *presence* only. In the corporations of Dean and Chapter, Mayor and Commonalty, the Dean and Mayor are integral, substantive parts; but no man pretends, that they have, for that reason, a negative on the proceedings of all the other members of the corporation. In aggregate corporations indeed a lease cannot be granted to the head, because he being an integral part of the corporation, must be *present* at the making of the lease, and the act of the majority being the act of the whole, the lease must also be made *in his name*, conjointly with the rest of the corporation; and therefore he would be both lessor and lessee, which cannot be. But a lease may be made to any other individual member, because not being an integral

integral part of the body corporate, his immediate presence is not necessary, nor is he specially named in the grant.

9thly. We come now, in the last place, to that passage in the statutes, ch. 25, on which the Provost, in consequence of his absolute negative, as now claimed, rests his power of nominating and appointing Fellows and Scholars *in all cases*: “ In quem vel quos major pars
 “ Sociorum Seniorum una cum Præ-
 “ posito vel, eo absente, Vice-Præpo-
 “ sito consensisse deprehendetur, is vel
 “ illi pro electo vel electis habeantur ;
 “ quod si in primo vel secundo scrutinio
 “ electorum major pars, cum Præposito
 “ vel, eo absente, Vice-Præposito, non
 “ consenserint, eo in casu, is vel illi pro
 “ electo vel electis funto, quem vel quos
 “ Præpositus vel, eo absente, Vice-Præ-
 “ positus, nominabit.” But from what
 has

has been laid down, it will easily appear, that no such power is conveyed to the Provost by this passage. For it is said, p. 50, "Præpositus & Sociorum Seniorum pars major electiones omnes Sociorum & Discipulorum definiant & concludant," and p. 56, that the power of electing is "penes Præpositum & majorem partem Sociorum Seniorum;" which expressions we have already seen convey no negative; and that an election may be valid though the Provost be individually dissentient. Accordingly we find, in this chapter "*De Electionum Forma et Tempore*," that the elections are to be concluded by the major part of the Senior Fellows, together with the Provost, *undè cum Præposito*; that is, as is otherwise expressed in various passages, by the Provost *and* major part of the Senior Fellows; and if they agree, the person on whom they agree is elected:

but

but if not; that is, if there be no agreement in the quorum consisting of the major part of the Senior Fellows *together with* the Provost; or in other words, if there be no majority, as may well be the case; then he is to be the Fellow or Scholar whom the Provost shall nominate. The various other passages of the statutes, as well as of the charter, which convey a joint power in elections to the Provost and Senior Fellows, and which treat of the authority of the Provost and Senior Fellows, and of the elections of Junior Fellows and Scholars expressly, do not give the Provost a negative, as we have already proved: it is therefore reasonable to conclude, that the object of this chapter, which professes to treat only of the *form* and *time* of elections, is not to extend his power; at least not to extend it in such a manner as would annihilate the idea of an election altogether;

F

ther;

ther; but to determine *the precise forms* which are to be observed at these elections, as it declares in the first paragraph, “ Quoniam ad regimen Collegii permul-
 “ tum conducit legitimam in electioni-
 “ bus *formam* observari,” &c.

It has been usual to interpret the passage of this chapter above cited, as if, in order to constitute an election, the major part of the Senior Fellows were required to agree with the Provost; but every one knows, that to say *major pars consensit unà cum Præposito*, meaning the consent of the majority with the Provost, would be utterly ungrammatical, and an instance of barbarous Latin without example. For the words *unà cum* cannot by any means be united with *consensisse*; they must be connected with *major pars Sociorum Seniorum*; the whole sentence, *major pars Sociorum Seniorum unà cum Præposito*, being the nominative case to *deprehendetur*;
 and

and *consensisse* is to be referred to the words *in quem vel quos* at the beginning of the sentence, expressing the object to which that consent is directed. So that the *consensus* spoken of is the *consensus* of the quorum denoted by the words *major pars Sociorum Seniorum undè cum Præposito*; and the object of that *consensus* is a certain candidate or candidates, denoted by the words *in quem vel quos*.

In this sentence, which we have just considered, the circumstances are pointed out which are requisite to constitute a legitimate election. In the next there is a provision made in case they should not happen to take place. It is evident therefore, that these two sentences must be interpreted with relation to the same object: In the first it is said, that there shall be an election, not if the major part of the Senior Fellows agree with the Provost, as we have already proved, but

if the major part of the Senior Fellows together with the Provost agree; the next sentence must therefore be interpreted so as to form the other alternative; that is, if the major part of the Senior Fellows with the Provost do not agree. So that from neither sentence can we infer any necessity for the concurrence of four Senior Fellows with the Provost, but that four Senior Fellows with the Provost, considered as one aggregate body, should agree; which agreement is consequently to be ascertained by the majority of that aggregate body. But the argument does not rest here: If we compare these two sentences with each other, we shall find a still more cogent reason for admitting their construction similar, though the expressions be not identically the same. In the former the word *undè* is prefixed to the preposition *cum*, but omitted in the latter;

ter ; because in the former sentence, the Provost not being one of the Senior Fellows, could not be comprised under that general title, and therefore the quorum is described as consisting of the major part of the Senior Fellows *together with* the Provost ; but in the latter sentence, instead of *Socii Seniores* the word *Electores* being used, under which the Provost is comprehended equally with the Senior Fellows, the quorum is there described as consisting of the major part of the *electors*, not *undè cum Præposito*, together with the Provost, for then the quorum would be made to consist of six persons, but simply *with* the Provost, *cum Præposito*, that is, including him. And this is a usual manner of describing a quorum ; thus the Dean *and* major part of the corporation are said to make the corporation, though the rest dissent ; see Watson, p. $\frac{3}{5} \frac{6}{2} \frac{8}{3}$, that is, the major part of the

the corporation, *including* the Dean, makes the corporation. See Freeman's Rep. p. 504. In the preceding sentence, the consent spoken of cannot be the consent of the major part of the Senior Fellows with the Provost, as we have already seen: neither can it in the latter; for if it were, since the whole number of electors is eight, and the majority five, and this majority with the Provost must agree, in order to constitute a valid election, there must, of consequence, be six electors, that is, five with the Provost, consenting, in case of election; which directly contradicts the former sentence, in which it is expressly declared, that four with the Provost are sufficient. The grammatical construction of the sentence therefore cannot be, that the major part of the *electors* must agree with the Provost, but that this major part of the *electors*, the Provost being included,

cluded, or *quorum unus sit*, agree; exactly conformable to the import of the preceding sentence already explained: So that the object of the consent of the aggregate body is in all cases the same.

The votes which are to be written down but *once*, "*suffragia semel scripta*," are directed to be counted over, or scrutinised three times, in order more effectually to guard against mistake; but if in the first and second scrutiny, there should not appear to be a majority of the whole elective body in favour of any candidate, then in the third the scrutineers are to search for the Provost's suffrage; and the candidate, whose name he has written down, shall be declared duly elected, "*quod si primo vel secundo scrutinio, &c.*" the latter sentence therefore should be thus translated, " he whom the Provost shall name, shall be declared duly elected
" in

“ in the third scrutiny, if there appears
 “ no majority in the two first ;” not
 “ that he shall be declared duly elected,
 “ *whom the Provost shall name in the third*
 “ *scrutiny;*” for the Provost, and every
 other elector also, nominates the candidate
before the scrutinies commence, as appears
 from the elector’s oath, nor does the
 third scrutiny consist in a repetition of
 any act of this kind, otherwise it would
 cease to be a scrutiny all together. So
 that the object of the three scrutinies is
 accurately to ascertain whether there be
 a majority, and if not, who he is for
 whom the Provost declares ; not to dis-
 cover whether the major part of the Se-
 nior Fellows agree with the Provost, as
 it is commonly interpreted, contrary
 both to sense and grammar.

But the interpretation now received is
 contrary to the principles of law as well
 as of grammar ; for if the Senior Fellows
 must

must consent with the Provost, in order to constitute an election, the Provost and Senior Fellows become two distinct parties; they have two distinct wills, and therefore are two distinct persons; and consequently no longer compose one corporate body. See page 55. In some cases, however, an approving power is lodged in one part of a corporation, and the *elective* power in another; but these are separate rights, and are not to be confounded in the same person, or part of a corporation; or, to use the words of Lord Holt, "they are distinct acts, to be done by several parties:" with which Justice Powell's judgment concurs, "the election," says he, "and approbation are two different things, and the election is consummate without the approbation. The Provost then, being an elector in the first instance, cannot be an approver, that is, he cannot have a negative.

negative. And of consequence his nominating power can only take place where there is no election, or where the corporation has no will, that is, where there is no majority.

The words *major pars Sociorum Seniorum unà cum Præposito* in the preceding sentence, and *electorum major pars cum Præposito* in the latter, are therefore descriptive of the persons who are to be present in order to constitute the quorum, not of the parties who must necessarily be consenting with each other. And that a quorum or major part may be said to consent, although some of the individuals thereof be dissentient, is evident as well from the general principle, that the act, election or nomination of the major part, is the act, election or nomination of the whole; as particularly from the words of the statute of the 33 Hen. 8. c. 27, in which
it

it is said, that the act of the head of the corporation with the consent of the major part is valid; in which it is on all hands allowed, that the statute means only the presence of that major part, and that the greater part of that majority is consenting to the act; agreeably to the case reported by Freeman, p. 504. And thus Lord Chancellor Hardwicke judged also, " It cannot be disputed," says he, " that whenever a certain number are incorporated, a part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part. And this," he further adds, "*is the common construction of Charters.*" 2 Atkyns, p. 212.

Now if this statute were supposed not to comprise those cases where any of the
major

major part were dissentient, consider what would follow: the whole corporation being duly summoned, and the head and major part assembled, one or two individuals of this major part dissent, and the measure now being supported by a number less than the major part of the whole corporation, is by this principle of no effect, contrary to all law and reason. In truth the meaning of the statute is plainly this, that the head and major part of the corporation being duly assembled, their act is valid, though some individuals may be dissentient; and therefore this act is said to be done with the consent of the major part of the corporation, though some of that major part be dissentient. On the same principle, the Provost and seven Senior Fellows may be said to have conceived good hopes of a candidate, if the majority have done so, for it would be absurd
to

to suppose, that one dissentient voice could vitiate the election, which would otherwise be the case : for in the first paragraph of chap. 7, it is ordered, “ ut
 “ in socios ii solum cooptentur, de quo-
 “ rum religione, doctrinâ, et moribus,
 “ tum Præpositus, tum Socii septem Se-
 “ niores, spem bonam animis concepe-
 “ rint ;” yet it never has been pretended, that every Senior Fellow was hereby re-
 quired individually to have conceived good hopes of the candidate, in order to justify the expression, and fulfil the intention of the statute. Aretinus also lays down the same principle, where he says, “ quando mandatur aliquid fieri
 “ in Universitate, ex passivâ inter-
 “ pretatione verificatur *in majore parte*,
 “ licet dicatur *de consensu omnium*, vel in
 “ plenâ concordia.” (*Vide l. pro hærede*
§ fi. ff. de acq. hære.)

If

If any one wishes for classical authority to satisfy him, that a number of persons may be said to consent, though some of them be dissentient, he may find it in Livy : “ Inde ordine alii rogantur : quandoque *pars major* eorum
 “ qui aderant, in eandem sententiam
 “ ibat, bellum erat *consensum*.” Lib. i. cap. 32.

Agreeably to this interpretation, we find that in the charter, where no ambiguity can arise from the use of the word *consensisse*, the right of election is more than once granted in this form (p. 29).
 “ Liceat & licebit Præposito & Sociis
 “ Senioribus vel majori parti eorundem
 “ *unà cum* Præposito, aliam idoneam
 “ personam eligere, nominare, & constituere,” where the Provost and Senior Fellows are expressly made *conjoint electors*, and the election, nomination and appointment is evidently the act of
 the

the aggregate body. The power of co-opting a Senior Fellow is conveyed in a similar form; the only difference being, that in this latter case, according as the number of electors is diminished by one or more, so also is the number constituting the quorum, "*Licebit Præ-*" "*posito cæterisque Sociis Senioribus*" "*tunc superviventibus, vel majori five*" "*æquali parti eorundem unà cum Præ-*" "*posito aliam personam, vel alias per-*" "*sonas, &c. eligere, nominare, & con-*" "*stituire.*" But what will put this matter in a very clear point of view, is the striking analogy which we may perceive between the forms in which authority is conveyed in special commissions, and in the charter of the College, given in the very same reign, and at the very same period. We find in several cases where Archbishop Laud was one of the commissioners, the form of the commission

to

to run thus, after reciting the names,
 “ we grant unto you, or to any four or
 “ more of you, of whom the said Arch-
 “ bishop of Canterbury shall be one,”
 &c. ; after mentioning the authority as
 vested in *the whole body*, *the quorum is*
next specified, of which the Archbishop
 was always to be one. Exactly in the
 same manner, in our charter, after the
 power is vested in *the whole body*, con-
 sisting of the Provost and Senior Fellows,
the quorum is next specified, of which the
 Provost was always to be one : whence
 it is evident, that the words *unà cum*
Præposito are equivalent to the expression
quorum unus sit Præpositus. But this last
 phrase does not imply any necessity of a
 coincidence of consent in him with the
 rest of the body : it signifies merely a
 necessity of presence only, as has been
 already shewn ; therefore neither can the
 other, with which this is exactly of the
 same

same import. We may further observe the very striking similitude which subsists between the form of this grant in our charter, and the grant in the charter of the Royal Society in the following words :
 “ Liceat & licebit præfatis Præfidi, con-
 “ cilio, & fodalibus Reg. Societatis, vel
 “ majori parti eorundem (quorum Præfi-
 “ dem unum esse volumus) alium ad sup-
 “ plendum prædictum numerum viginti
 “ & unius personarum nominare, eligere,
 “ & præficere.” And in another passage of the charter of the same Society, “ Affig-
 “ navimus, constituimus, & fecimus di-
 “ lectos nobis & fideles Robertum Moray,
 “ Robertum Boyle, &c. *unà cum* Præfide
 “ prædicto, fore & esse primos & mo-
 “ dernos viginti & unum de concilio
 “ Reg. Societatis prædictæ,” &c. So that it evidently appears, as well from comparing parallel passages in the different charters, as corresponding passages

in the same charter, that the phrases *und cum* and *quorum unus sit*, are of the same import, denoting merely presence, and no necessary coincidence of private opinion.

In the corporation of the city of Carlisle, where the power of election is, by the charter of Charles the First, granted to the Mayor, Aldermen and twenty-four capital Burgeses, *or the greater part of them, of which the Mayor to be one*, in case the number of choosers be even, then the Mayor is to have a double voice (Sir Thomas Raymond, p. 435); that is, the quorum consisting of the Mayor and major part of the Aldermen and Burgeses being present, in case there be no majority, he whom the Mayor nominates shall be elected: In like manner, at the election of Fellows and Scholars, the quorum being present, in case no candidate has a majority, he for whom the
Provost

Provost shall have voted is to be declared elected. We ought not to forget, that it was the same King that gave to the city of Carlisle their charter, and to us our statutes.

II. I shall now proceed, in the second place, to state some of the evils and absurdities which follow from the received interpretation of the statutes.

1. Were the Provost invested with an absolute negative on all proceedings of the Senior Fellows, the whole body would be frequently subject to inaction: in all such cases, it is acknowledged, a remedy is provided in the charter, viz. an appeal to the Visitors; who are authorized to compose all disputes, actions and controversies, which the Provost and major part of the Senior Fellows cannot. But the cases in which the Provost might well be supposed to dissent from the majority, would be too numerous to be

decided in that manner : and though perhaps most of the instances in which the Provost should thus dissent, might not be, separately, of sufficient consequence to be brought before the Visitors, as matter of appeal, yet an accumulation of such interruptions in business would prove highly detrimental to the interests of the College. But if we suppose the Provost not invested with such a power, we shall have a constitution in every respect wisely and temperately framed. There is one case, and only one, under such a constitution, in which the corporation could be inactive, that is, where the eight votes should be equally divided : and if in such a case, every member should be so strongly wedded to his own opinion, as to feel it impossible to yield a little for the preservation of concord in the body, it surely must be on a question that ought, in all propriety,

propriety, to be decided by the Visitors. In elections, however, which do not admit of this remedy of concession, the electors giving their votes on oath, and these votes being afterwards unchangeable, there is a provision made to prevent inaction, by vesting a nominating power in the Provost. And this seems to be a strong collateral argument, that inaction in other cases was not reasonably to be expected. Perhaps there may appear to be no remedy for inaction, if there be no agreement in the corporation, in one of the most important cases, the election of a Chancellor; as that power ceases to exist which should remedy the evil: but we are to observe, that even this inconvenience has been wisely guarded against; for there being no Chancellor, neither would there be a Vice-Chancellor: consequently there would be but one Visitor, the Archbishop

bishop of Dublin, who, were there no majority, would terminate the discord. Under the charter of Elizabeth, which certainly gave the Provost no negative, as we have proved by the case of the corporation of Bristol, exactly in point, see page 28, the number of Fellows having a right to vote, was an uneven number, as under the charter of Charles the First; and the same remedy had been provided to prevent inaction, where the corporation could not come to any final determination. The reason why Archbishop Laud made eight the number of persons having a right to vote, rather than the extreme odd numbers, seven or nine, seems to be, that every measure should be carried by such a majority as would clearly evince its propriety. Thus in 7 voters, the ratio of the efficient majority to the whole is 4 to 7; in 8 voters, 5 to 8; in 9 voters, 5 to 9; of
which

which 5 to 8 is the greatest ratio ; and therefore by making the number of voters even, there is established a majority approaching towards that species anciently introduced under the civil law, and probably originating from the same principle.

2dly. I believe no instance can be produced of any corporation so constituted, that one person shall have a negative on the deliberations and decisions of all the rest ; and finally have an affirmative also vested in him, by which the whole deliberation of the corporation is reduced to nothing, as is the case, at present, in the election of Fellows and Scholars.

3dly. It is absurd to say, that the Senior Fellows are electors, if, notwithstanding their unanimous consent, the election may be determined against that consent. In truth they cease
to

to be electors in any sense, and the Provost becomes the sole and only elector, his single vote in all cases deciding the election.

4thly. The electors, as they are called, take a solemn oath in the face of God, and enter into a secret scrutiny, which is thrice repeated, and for what?—For a mere word—Not to discover who is to be the Scholar or Fellow, for that depends solely on the Provost, who having taken the elector's oath, and written down his vote, can no more change that vote than any other elector; but to ascertain by what title he is to be announced, *elected* or *nominated*. This, besides its absurdity, seems to border on impiety, in thus trifling with the sacred solemnity of an oath.

5thly. The object of the scrutiny as now carried on, is to try, if there be no majority, whether any of the electors be so wavering in his judgment, or so little
averse

averse from perjury as to alter his vote, in order that the title of the announced Fellow may be changed from *nominated* to *elected*. A worthy object truly for this mysterious scrutiny!

6thly. It is ridiculous and absurd that those who are merely *nominal* electors, and whose votes have no real influence whatever in the election, should be subject to the severest penalties (see p. 59 of the Statutes) for disposing unjustly of their inefficient and nugatory votes; and yet that the one elector, whose single voice decides the election, should not be subject to any punishment for the greatest violation of his trust.

7thly. On the scrutiny, the Provost must either alter his vote or not; if he changes his vote, by acceding to the majority, according to the received interpretation he is guilty of perjury; if he does not, the whole business of election becomes

becomes an impious and solemn farce. Perhaps it may be said, that though the Provost has this nominating power, yet he will not always exert it; or that, by conferring with the Senior Fellows, he may inform his understanding, so as never to nominate, except where he finds that the Senior Fellows cannot produce sufficient reasons for his altering his opinion as to the merits of the candidates. But none of these things can possibly take place; for here is no examining of reasons, or weighing of arguments, nor any means or opportunity afforded of changing votes—the scrutiny is to be *secret*, no one is to declare to another either by word, sign or writing, in what manner he intends to vote (see page 98 *infra*); and as the votes can be written but *once*, it follows, that according to the received interpretation, the Provost's single vote must, in all cases, necessarily

neceffarily and unavoidably determine the Fellow or Scholar, without any poffibility of the contrary, even on his part. So that in truth and in fact, it is the fingle vote of the Provost which decides *every* election, and it can never be otherwife; and the formal scrutiny and folemn fwearing of the Fellows is not, nor can be of any effect whatever. Now can any man in his fenfes believe, that the elections of Fellows and Scholars could poffibly have been put upon fuch a footing by Archbishop Laud, even fupposing his principles as arbitrary as can be conceived? If he had given the Provost the power of controuling the Senior Fellows occafionally, where he might think they were proceeding to the election of an improper perfon, this, though a great extenfion of power, yet would not be fubject to the imputation of abfurdity. But to
direct

direct that he should give his vote *secretly* and *but once*, and that this vote alone should determine the election; and at the same time provide, with the utmost care, against any unfair disposal of the votes of the other electors; and lay down, with so much accuracy and precision, the form that was to be observed in voting, and in declaring the elected Fellows and Scholars, seems to be utterly inconsistent with all pretensions to common sense, in which, however, we well know, the Archbishop was not deficient.

8thly. In the charter the power of electing Fellows and Scholars is granted to the Provost and Fellows conjointly; and the like grant is more than once repeated in the statutes. It is evident therefore, that it was the intention of the framer of the charter and statutes to convey, by these clauses alluded to and formerly quoted, *some part* of the power
of

of election to the Senior Fellows. But according to the present interpretation of the statutes, the clause in the chapter *de electionum formâ & tempore* relative to this subject, is made to supersede this absolute and positive grant, and directly to contradict the clauses above mentioned, transferring to the Provost the whole power of election, in all cases, without any exception or restriction.

It is a maxim in the interpretation of statutes, laid down by Judge Blackstone, that "one part of a statute must be so construed by another, that the whole may (if possible) stand, *ut res magis valeat, quam pereat*: for this interpretation furnishes matter for every clause of the statute to work and operate upon." Comment. Introd. § 3. Now if the 25th chapter of our statutes be interpreted in the usual manner, the voting of the Senior Fellows is nugatory; their
taking

taking the solemn oath of electors is nugatory; the secret scrutiny is nugatory; and the whole clause is set at variance with the preceding passages of the charter and statutes, relative to elections, in which part of the elective power is granted to the Senior Fellows: whereas if it be interpreted in the manner which I have endeavoured to explain, the statutes become consistent with themselves, and as Blackstone well expresses it, “there is matter for every clause to work and operate upon.”

III. I shall now confirm the interpretation of the statutes which I have endeavoured to establish, by the practice of the University of Oxford, whose statutes were revised and corrected by Archbishop Laud, as was done also by the same Archbishop with respect to our own.

In

In the Statuta Carolina, the election of a Proctor is thus spoken of, "Procuratorem in unoquoque collegio (prout vices postulant) rite et legitime *electum* decernimus, quem major pars omnium suffragantium *nominabit*. Quod si duo, *pari uterque numero suffragiorum*, nominentur, ille pro electo habeatur, quem Præfectus vel, eo absente, ejus vicem gerens *nominabit*:" which precisely corresponds with our elections rightly interpreted, where the majority in all cases determines the Fellow or Scholar, and the right of nomination is vested in the Provost or Vice-Provost only where there is no majority. But the form of elections in the house of convocation bears so strong a resemblance to our elections of Fellows and Scholars, that I think there is no doubt, but that our form was either taken from that of Oxford, or with it from

from some common original. And what seems to put this beyond all controversy is, that there is not a circumstance in our elections of which there is not an exact parallel in the Oxford form.

In the Oxford statutes it is directed, that the statute of elections be first read,
 “ Cautum est quod in omni electione
 “ (antequam ad suffragandum accedatur)
 “ præsens statutum unà cum juramento
 “ prædicto et statuto Regni Eliz. 31. legatur.” Or, as it is in our statutes,
 “ Volumus ut quoties focii Juniores et
 “ discipuli eligendi sunt, focii Seniores
 “ convenient in sacello, et perlectis statutis de eorum qualitate et electione,
 “ unà cum hoc capite *de forma et tempore electionum*,” &c.

Which being done, all the electors take an oath, “ et juramentum ab omnibus
 “ ac singulis suffragaturis exigatur.” Or, as it is in our statutes, “ Quo peracto,
 “ quisque

“ quisque elector hoc juramentum dabit.”

Which oath is conceived in these words,

“ Jurabis quod neminem *nominabis* nisi

“ quem habilem et idoneum certo scive-

“ ris, vel firmiter credideris, nec ulla

“ conditione nec pacto, propter aliquam

“ promissionem vel remunerationem ali-

“ quem nominabis.” With us it runs

thus, “ Deum testor, me illum vel illos

“ *nominaturum* et electurum, quem vel

“ quos statuta nuper lecta significare et

“ apertius describere mea conscientia ju-

“ dicabit, omni illegitima affectione,

“ amore, & similibus sepositis.”

Then the *Vice-Chancellor*, and *two Proc-*
tors sit in *scrutiny*, and after having *first*
given their votes, the rest of the electors
vote according to *seniority*. “ In scrutinio

“ ubi Vice-Cancellarius et Procuratores

“ suffragati fuerint, quisque suffragans

“ secundum ordinem senioritatis accedat:

“ et procuratoribus a latere Vice-Cancel-

H

“ larii

“ larii utrinque sedentibus, et eorum al-
 “ tero schedulam sic accedenti exhibente,
 “ votum suum simpliciter et absolute
 “ inscribat.” Or, as it is with us,
 “ Confidebunt inde in scrutinio secreto
 “ Præpositus cum duobus fociis maxime
 “ Senioribus, et suffragia sua primi om-
 “ nium descripta deponent. Postea re-
 “ liqui focii Seniores juxta ordinem Se-
 “ nioritatis.”

This scrutiny is also a *secret* scrutiny,
 “ Nec ante pronunciationem quicquam
 “ de votis alicui (quoquo modo, verbo
 “ vel signo) revelabunt.”—In our sta-
 tutes, the votes are taken “ in scrutinio
 “ secreto.”

The votes are also to be *written down*,
 “ *Nominatio* fiat per scrutinium in scrip-
 “ tis:” With us, “ Suffragia pro nu-
 “ mero locorum supplendorum scri-
 “ bent.”

And

And the votes are to be written down but *once*, “ Jurabis quod unum aliquem
 “ et unum tantum *semel et non amplius*
 “ in hoc scrutinio scribes et nominabis :”
 With us, “ simul et semel scribent.”

Further, there are *three* proclamations of *the scrutiny* : “ Cum autem longius in
 “ electione processum fuerit, defecerint-
 “ que qui suffragentur, priusquam scru-
 “ tatores suffragiorum numerum ineant,
 “ superior facultatis artium Bedellus per
 “ domum convocationis ad suffragandum
 “ altâ voce præconizabit : “ Magistri ad
 “ suffragandum *primâ vice* ;” deinde ex
 “ intervallo unius horæ quadrantis,
 “ Magistri ad suffragandum *secundâ*
 “ *vice* ;” et tertio post alium horæ qua-
 “ drantem, “ Magistri ad suffragandum
 “ *tertiâ vice*.” The scrutinies in our elec-
 tions are three, corresponding to the three
 proclamations above-mentioned, “ Eo
 “ in casu in *tertio scrutinio*,” &c. Lastly,

the votes being counted, he that has a majority of votes is to be declared elected, "Eum in quem, computatis suffragiis, majorem numero partem consensisse compererint pro electo palam pronunciant." But if there be no majority, or if two or more candidates have an equal number of votes, then he on whom the Vice-Chancellor shall agree is to be declared elected. "Si duo vel plures, æqualem suffragiorum numerum sortiti sint, tunc is in quem Cancellarius (vel Vice-Cancellarius pro tempore existens) consenserit pro electo habeatur, et ad officium suum e vestigio, si præsens fuerit, admittatur."

I believe no one who compares this form with ours can for a moment doubt, but that they were intended to convey the same ideas; and these ideas being fortunately conveyed in different terms, the one becomes an explanatory comment
on

on the other. We may observe, how exactly the case of nomination corresponds to that described in our statutes; and that the nomination, that is, the vote of the Prefect or Provost is never conclusive except when there is not a majority in favour of any candidate.

It is true, the force of this argument rests principally on the supposition of our statutes having been revised by the very same person who revised those of Oxford; but it does not therefore necessarily follow, that the spirit of both should be precisely the same. And it must be further allowed, that any argument derived from mutilated extracts is not too implicitly to be relied on. The entire body of the statutes, and charter of incorporation, must be submitted to our examination, before we can pretend to lay any considerable stress on such a parallel; in order to discover whether, by the omission

sion or insertion of the same phrases, the reviser had intended, that both codes should breathe the same spirit, or not. However it must be admitted, that the identity of the phrases and circumstances very much corroborates the position, that, in this particular instance at least, I mean elections, it was intended that the statutes in both cases should have the same force and import.

But even granting that the heads of some English Colleges were invested with a negative, either in general, or in particular cases, yet nothing could be deduced from thence, in favour of the Provost's negative in this College, unless it were proved, either that Archbishop Laud framed these very statutes by which such a power was unequivocally granted, or that the same phrases had been literally transcribed into our code. Because though the founders of those Colleges

leges might have judged such a power expedient, Archbishop Laud might have thought otherwise; and therefore given us a different constitution: and also because our statutes were *at first* framed by the Provost and Fellows under the power vested in them by the charter of Elizabeth, which certainly did not give the Provost a negative; and these very statutes compose the principal body of that code under which the College is now governed; for they were only reduced into a more perfect form, *in formam redacta*, and confirmed by royal authority, *authoritate regiâ munita*, in the time of Charles; and therefore cannot be supposed to be essentially different from those which were framed under the charter of Elizabeth.

Perhaps it may not be improper to remark, that the casting vote, at elections, given to the Provost by the statutes, is
granted

granted to him only through necessity, in order that there may be no delay in filling up the vacant lectureships ; for in the co-optation of a Senior Fellow, his vote or nomination has not this effect ; but in case there be not a majority, the appointment devolves to the Chancellor.

It is important to observe, that there is nothing peculiar or unusual in our election of Fellows and Scholars ; it is described in the manner in which all elections are described in books of canon law ; and as the legal majority which constitutes a valid election in them is so clearly explained and established, it is to be hoped, that the extravagant doctrine of the Provost's nominating power *in all cases* will hereafter be considered as a gross violation of the letter and spirit of the statutes. Burn, when speaking of the general rules relating to elections, which lie dispersed in the body of the canon

canon law, after giving us those which
 regard the time, manner of proceeding
 to the election, and the appointing of
 proxies, thus proceeds: " When the
 " election is to be made, and all are pre-
 " sent who ought, and will, and can
 " conveniently attend, *three of the so-*
 " *ciet*y shall take the votes of every one,
 " *secretly* and severally; and put the same
 " in *writing*; and then immediately pub-
 " lish the same amongst all; and on cast-
 " ing up the votes, he shall be elected,
 " *who has the majority of legal votes.*
 " And *they cannot vary* after the votes are
 " published, for then they ought to pro-
 " ceed to cast up the votes, and declare
 " the election. By the *majority* is meant
 " the majority of the whole number of
 " electors; therefore if there be seven
 " electors, and two of them chuse one
 " person, and two another, and three
 " another, he who has three votes shall
 not

“ not be duly elected, as not being chosen by a majority of the electors.”
 Vide Ecc. Law, vol. i. p. 257. See also the Decretals of Gregory, B. 1. ch. 42. tit. *Quia propter*. And Bernard, in his gloss upon this chapter, assigns the following reason why the votes are to be written down, viz. *ut appareat per scripturam de consensu cujuslibet, ut si vellet mutare, ei scriptum obviet*.

IV. From this view of the statutes of the College it is evident, that they do not convey a general negative power to the Provost; that the negative power being distinctly and formally expressed in some cases, shews that it was not the intention of the framer to communicate it to him in all, according to the old law maxim, *expressum facit cessare tacitum*. But the expressions must be very precise and cogent indeed which would authorize

thorise our vesting him with a power so unparalleled and contrary to the common law of the land.

In a trial at bar for the parsonage of Hasely in the county of Oxon, the church being in the presentation of the *Dean and Canons* of Windsor, where there are twelve Canons beside the Dean, which in all make up thirteen of the corporation, it was held,

1. That, *primâ facie*, in all acts done by a corporation, the major number must bind the lesser, or else differences could never be determined.

2. That all acts done by the corporation ought to be done by the *consent of the major number*, or else they are not valid; and therefore, where the corporation consists of thirteen, there ought to be seven to make a chapter; but the act of *the major part of those seven* is binding

ing to the corporation. See Freeman's Reports, p. 504.

Judge Blackstone, speaking of the statute passed in the 33 Hen. 8. c. 27, says, that it was the intention of that act to annul all private statutes, whereby any grant or election made by the head with the concurrence of the major part of the body, was obstructed by any one or more being the minority; and did not extend to any negative given by the founder to the head of any such society. As to the first part of his assertion it perhaps may be true; but the ground on which that statute was enacted was this, that a negative in any one having a right to assent or dissent was contrary to the laws of the land; and therefore the principle extends not only to those local ordinances by which unanimity was required in order to render an act valid, but

but also to those where the act of all the rest of the body might be obstructed by any *one*, as is well observed by Burn, Ecc. Law, vol. 2. p. 106. “ This act (says he) “ seemeth to be expressed in “ terms somewhat confused; but the “ manifest intention is, *to establish the rule of the common law*, that a majority of “ the body corporate should bind the “ rest. In some parts of the act, the “ Dean seemeth to be contradistinguished “ from the Chapter, so as that the negative of the inferior number of the “ Chapter only, exclusive of the Dean, “ was hereby intended to be taken away; “ but the other parts of the act seem to “ explain this, expressing, that all local “ statutes, whereby the grant, lease, or “ election of such corporation should be “ any-wise hindered by any one or more, “ being the lesser number of such corporation, contrary to the course of the “ common

“ common law, shall be void. And it is
 “ certain, the Dean is one, and but one
 “ member of the body corporate.

“ Unto all which may be added, that
 “ the rule, for the necessity of a major-
 “ rity of the whole body to be consent-
 “ ing, is not only agreeable to the com-
 “ mon law, and (as it seemeth) to *the*
 “ *declaration of the said statute of the 33*
 “ *Hen. 8.* but also to the ancient canon
 “ law, which clearly determineth, that
 “ elections shall be made by the *major*
 “ *et sanior pars*, that is, by a majority of
 “ legal votes.” Vide article *Dean and*
Chapter. Bolingbroke, in his marginal
 notes on this statute, agrees with Burn,
 as also does Gibson in his Codex; and
 Wood, in his Institutes, Imperial Law,
 b. 1. ch. 3. refers to this statute, as
 confirming the general maxim of com-
 mon law, that “ the act of the major
 “ part

“ part *simply and absolutely* is to be
 “ esteemed the act of the whole body.”

The Warden, three Burfars, five Deans, and five Senior Fellows, of New College in Oxford, by the peculiar statutes of the house, have authority given them to dispense with the absence of a Fellow for the space of two months.—If the major part of these grant and assent to the dispensation, and the residue dissent, it is thought by the opinion of two Chief Justices, the Chief Baron, Justice Whiddon, Browne and Weston, that it is not good, because it does not come under the case of the statute of 33 Hen. 8. c. 27, which extends to the grants and elections of the *major part of the whole corporation, having voices of assent*, (as may be seen in the preamble to that statute) and not to any particular number of the corporation, as is the case here. Dyer, p. 247. Now by the statutes of our
 College

College all power is vested in the Provost and major part of the Senior Fellows, not exclusively of the rest of the corporation having a right to vote, as is the case in this peculiar ordinance of New College, but as virtually representing the whole, inasmuch as they are the major part of the whole corporation having a right to vote. It appears then by the opinion of these Judges, that all elections, &c. by the major part of the whole corporation are valid, and, consequently, that the head of the corporation has no negative on the proceedings of the major part.

When powers are granted to a select part of a corporation, or the greater part of them, of which the head of the corporation is to be one, the same reasoning holds as when they are granted to the head and the whole corporation at large. This is evident from the preamble to
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the 33 Hen. 8. c. 27, so often cited; where it is shewn, that by the common law of the land, the acts of the head of the corporation, with the majority of those members which have voices of assent, that is, *which are the governing* part of the corporation, are valid. Thus in the Royal Society, and Royal Irish Academy, where power is granted to the President, and a certain number of the Fellows or Members, called the Council, or the greater part of them with the President, all measures are carried by a majority of voices. Where the power is granted to a Mayor and a select number of the members of the corporation called Aldermen, measures are likewise carried by the majority of the major part duly assembled, the Mayor always being one. Thus the citizens of Carlisle were incorporated by the name of the Mayor and Citizens of the city of Carlisle; and the

power was lodged in the Mayor, and eleven of the citizens called Aldermen, and thirty-two other citizens, who with the Aldermen made the common council; and the power of removing any Alderman was lodged in the Mayor and these eleven Aldermen, “ quilibet Confiliarius alias Aldermannus fuit amovibilis a loco Confiliarii per Majorem & Confiliarios five Aldermannos, vel majorem partem eorum, quorum Major fuit unus.” Sir T. Raymond, p. 437. The corporation of Bristol consists of a Mayor and Commonalty, of which twelve called Aldermen, including the Recorder, are of the private council, *de privato concilio*, of the city. 3 Mod. p. 3. In 11 Co. f. 94, we have a writ directed from King James to the Mayor and Commonalty of Plymouth, “ Majori & Communitati Burgi Plymouth,” in which it appears, that the Mayor and twelve of the

Capital

Capital Burgesſes conſtituted the private council; and twenty-four other citizens, with them, conſtituted the common council; “ viginti quatuor de aliis *Diſcretioribus* Burgenſibus Burgi prædicti fuerunt, “ ſimul cum Majore & duodecim *Capitulis* Burgenſibus de communi concilio Burgi, &c.” In the corporation of Yarmouth, the power is lodged in a Mayor and eleven of ſuch Capital Burgeſſes; and in all caſes of this kind, the act of the majority of the governing part of the corporation is valid, ſee page 40 *infra*. In our College, the Provoſt and ſeven Senior Fellows may be ſaid to be of the private council of the College, and the reſt of the Fellows and Scholars, with them, to conſtitute the common council. And in like manner as all affairs of conſequence are to be tranſacted with the *counſel* of the Senior Fellows, ſo Aldermen are called *Conſiliarii*, by whoſe coun-

fel the weightier matters of cities and boroughs are to be determined; and their office and consequently their privileges appear evidently to be the fame.

In the cafe of the indictment brought againft fix Aldermen of Bristol for electing an Alderman in the abfence of the Mayor, which is reported in 3 Modern, p. 3. 11. 14. it was never pretended that he had a negative, though the words of the charter, which was granted to that city by Queen Elizabeth, agree precifely with our's of the fame Queen, and with feveral paffages of our ftatutes; the power of election being given "Majori et Aldermannis vel majori parti eorundem;" as in our charter of Elizabeth, "Præposito & fociis vel majori parti eorundem," p. 5, and in our charter of Charles, "Præposito & fociis Senioribus vel majori parti eorundem," p. 25; and in p. 52 and 145 of Charles'

Charles' statutes. See also p. 157. 159. 167. 170. of the statutes of George the 2d; from which, as well as from the form of the grant itself, it is evident that it is exactly of the same force with the grant in the charter of King Charles. Now we know, that in the trial of that indictment, the only doubt entertained on that clause was whether *even the presence* of the Mayor was absolutely required by it: " I think it will be granted, (says the Recorder of Bristol) " that the " Mayor has no negative voice in the " election of an Alderman; as great a " Prince, and as absolute as the indictment will make him, he has but one " single voice; and if the majority of " votes be against his vote, *the majority must carry it against the Mayor*—He is " the *Major*, that is, the greater, the " more eminent; this notes his pre-eminence in respect and reverence, but " gives

“ gives him little more or greater power
 “ than what the rest of the Aldermen
 “ have.”

If a corporation consists of a Mayor and eight Aldermen, with a clause in the patent, “ Quod super mortem vel remotionem alicujus Aldermanni infra octo dies proximo post mortem vel remotionem, &c.” to elect another Alderman, &c. and that the greater number of the Aldermen meet without the Mayor or his Deputy, and elect an Alderman, that is to be a void election—But why?—because the Mayor ought to be *present* at it, by the words of the grant. See Rolle’s Abrid. f. 513, 514.—Now the words of our charter, and almost the whole wording of our statutes, where the Provost and Senior Fellows are mentioned together, convey no greater power to the Provost than is conveyed to the Mayor by this expression, which without controversy

controversy has been admitted not to convey a negative.

The Provost is named in the grant out of necessity, it being part of the name of the corporation to which the grant is made. He is named out of conformity too; for not being a Senior Fellow, he could not be included under that general appellation, and must therefore be named by himself: 3 Mod. p. 9. But it were needless to cite more precedents, or to argue on them in a case so clear.

It appears from the cases and authorities already cited, that all valid acts of a corporation must indeed be done by the head and major part of the corporation, and that more is not required; that is, the head and major part must be present, but it is not necessary that the head and major part thus assembled should be unanimous, the majority of
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the head and major part collectively taken and representing the whole corporation, (reserving to the head his privileges, whatever they may be, by the local statutes or laws of the corporation,) being competent to the execution of valid acts.

I shall conclude this argument with an authority which few will venture to call in question, it is the authority of Lord Mansfield, who in the case of the King versus Windham, Warden of Wadham College, has given an opinion so express on the point now in debate, as must remove all uncertainty, if any, after what has been said, should still remain: "As to the statute concerning the college seal being put, (says his Lordship) " Doctor Windham contends for a " negative, and that the Warden must " be one. The words of the statute are " these: *Hoc etiam volo, ut sollicitudine*
" *cautum*

" cautum sit, ut nihil figilletur quod non
 " per *Gardianum et majorem partem Socio-*
 " rum mature deliberatum concordatur,
 " et per * *eosdem* comprobatur. I am
 " clear these words do not give the War-
 " den a negative. Warden and Fellows
 " are a description of the corporation;
 " and the expression *per eosdem* without
 " any repetition of the word *Gardianum*
 " must mean the major part of the body.
 " Therefore I am of opinion a *Manda-*
 " *mus* ought to go." The *three other*
Judges concurred. Cowper's Reports, Jan.
 25, 1776. These Judges were Aston,
 Ashurst, and Wills. When Lord Mans-
 field

* As in our statutes, " Puniatur ad arbitrium
 " *Præpositi & majoris partis septem Sociorum Seniorum,*
 " nisi justam recusationis causam asserre possit ab
 " *iisdem* approbandam." See chap. 10. See also
 page 123, ch. 22. " *ab iisdem* approbandam;" and
 p. 125. " *eorundem consensu*;" and " *de prædicto-*
 " *rum consensu*," *ibid*; and in p. 131, " *licebit*
 " *etiam iisdem electoribus*," &c.

field says, that *Warden and major part of the Fellows* are a description of the corporation, it would be absurd to suppose, that he considered these words as *the name* of the corporation; both because no corporation ever received so ridiculous an appellation, and also because, besides a Warden and fifteen Fellows, there are fifteen Scholars likewise on the foundation. The College is thus described in deeds and leases, &c. “ The Warden
 “ of Wadham College, in the Univer-
 “ sity of Oxford, of the foundation of
 “ Nicholas Wadham and Dorothy his
 “ wife, and the Fellows and Scholars of
 “ the same College.” Lord Mansfield’s meaning therefore is evidently, that these words *Warden and major part of the Fellows* are descriptive of the governing or acting part of the corporation, or, as it is expressed in the preamble to 33 Hen. 8. c. 27, of those members of the corporation

poration which have a right to vote ; in like manner as in our statutes the words *Provost and major part of the Senior Fellows* are descriptive of that part of the corporation to which the regimen of the College is entrusted. This decision of this *noble Judge*, as he is called by the learned Buller, has been recognized as sound law by that great common lawyer Lord Chief Justice Kenyon : “ In corporations,” says he, “ the act of the majority binds the whole ; so much so, that the court will compel the person, who has the custody of the College seal, to affix it to any act according to the vote of the majority, *though against the consent of such person* ; as was done in the case of Wadham College.” Cases in K. B. Easter term 1790.

At what period the unwarrantable extension of the Provost's prerogative here controverted first commenced, it is not easy

easy to learn ; we find no indications of it before the time of Baldwin, who was made Provost for the purpose of suppressing a faction, and when party ran so high, that any opposition to his authority would have been fruitless. Since the foundation of the college we can discover but three Provosts that have exercised the nominating power, grounded on their absolute negative, Baldwin, Andrews, and Hutchinson : Baldwin's conduct has been accounted for from the politics of the times ; Andrews exercised this power twice *, and on both occasions the votes were equally divided ; on the latter of which he made use of these remarkable words, " This I call a *statutable* nomination ;" In which words we have the testimony *even of a Provost*, that the only case in which the nominating power
can

* In the years 1765 and 1774.

can be statutably exerted, is where there is no majority.

But were the exercise of this power of much earlier date, and supported by a greater variety of instances, precedent could not operate against the foregoing argument. The framer of the statutes, well knowing that continued perseverance in wrong can never constitute right, has decreed, that no usage or long continued abuse, or act whatsoever, should in any wise derogate from the letter and spirit of the statutes, “ *Nolentes quod*
“ *per consuetudinem ullam, aut diuturnum*
“ *aliquem abusum, aut actum*
“ *quemcunque, verbis aut intentioni*
“ *dictorum statutorum in aliquo derogetur.*”

Where the words indeed of charters or ordinances are of *dubious* construction, or in matters *indifferent*, or which are are not *mala in se*, custom or long continued

nued usage may be considered as a contemporary comment; or as forming a kind of rule which has been found useful, and should not therefore be lightly departed from. But it is in these cases only that usage is of any force, *see Cowper, p. 250*. In the present question therefore, where the forms of expression in our Charter and Statutes, on which the negative power of the Provost is said to be founded, have received so many distinct expositions in the courts of law, and do also derive so decisive a commentary from other passages of the statutes themselves; where the matter in debate is not a matter of indifference, but of the utmost consequence, affecting so directly the advancement of learning and religion, we must presume that usage will be little regarded: These considerations ought to have great force were the precedent even of ancient date; but
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though the College records, as well of elections as of other matters, have been regularly kept from its foundation to this day, we cannot trace either the claim or exercise of the negative or nominating power farther back than the time of Provost Baldwin, whose government in other instances also was irregular, as appears from the College registry. To these unjustifiable exertions of power the Fellows were obliged to yield, supported as Baldwin was by that authority to which alone they could appeal. But the loyalty of the University is now unimpeachable: we are therefore persuaded, that this question will be decided on its own merits, unmixed with any political considerations; and that the true interpretation of the statutes, and the intention of the framer, will prevail over a claim contrary to reason, unsupported by ancient

cient usage, and inimical to the interests of the University.

V. We have now proved that the Provost is not invested with a general negative by the statutes, and that there is no precedent of sufficient force or authority to warrant its exercise. We have shewn, that the *presence only* of the Provost and major part of the Senior Fellows is requisite for the execution of corporate acts. It remains therefore only for us to shew, in what circumstances business can or cannot be transacted without the presence of the Provost or Vice-provost. Now though the presence of the Provost be necessary at the commencement of any collegiate business, yet that business once begun, if the Provost dissolves the Board by leaving it without the concurrence of the Senior Fellows, they may, even in his absence, proceed

proceed to the completion of that business which was begun when he *was* present.—This will appear from the following case, directly in point: “ A charter required, that the presence of the Mayor should be necessary at all corporate assemblies: the corporation were assembled, and a matter being proposed, the Mayor dissolved the assembly; but *the remaining part of the corporation continued together and proceeded*. It was objected, that such after-proceedings were irregular; but the court said, it was very true, that no *new* business can be proposed in the absence of such officer, but that the assembly has always a right to proceed in the business which begun when he was present. Accordingly they made the rule absolute.” See Barnardiston’s Rep. in B. R. 385, 386. The King v. Norris.

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proceed to the completion of that business which was begun when he was present—This will appear from the following case, directed to a point:—A case was required, that the presence of the Mayor should be necessary at all corporate assemblies: the corporation were assembled, and a matter being proposed; the Mayor dissolved the assembly; but the remaining part of the corporation continued together and proceeded. It was objected, that such after-proceedings were irregular; but the court said, it was very true, that no new business can be proposed in the absence of such officers, but that the assembly has a right to proceed in the business which began when he was present. Accordingly they made the rule absolute. See *Barnardiston v. Reg.* in 105. 386. *The King v. Norton*.

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